MOTION FILED
JUN 23 2000

(4)

NO. 99-1880

IN THE
Supreme Court of United States

GRAEME FREEMAN, *et al.*,
Petitioner,

v.

BURLINGTON BROADCASTERS, Inc., dba WIZN, *et al.*,
Respondent.

On Petition For a Writ Of Certiorari
To The United States Court of Appeals
For the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* JAMES M. JEFFORDS, PATRICK LEAHY AND BERNARD SANDERS, OF THE STATE OF VERMONT

SENATOR JAMES M JEFFORDS
Counsel of Record
SENATOR PATRICK LEAHY
United States Senate
Washington, D.C. 20510
(202) 224-3121
CONGRESSMAN BERNARD SANDERS
U.S. House of Representatives
Washington, D.C. 20515
(202) 225-4115

16pp

QUESTION PRESENTED

Is local zoning preempted by the Federal Communications Act and regulations promulgated by the Federal Commications Commission when radio or telecommunications facilities cause interference with local electrical and electronic devices used by local businesses and institutional services?

**MOTION OF JAMES M. JEFFORDS, *et al.*,
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

TO THE HONORABLE COURT:

COMES NOW, JAMES M. JEFFORDS, and files this Motion for Leave to File Brief as *Amici Curiae* on his behalf and that of other *Amici*.

JAMES M. JEFFORDS is a resident of Vermont who seeks to inform this Honorable Court of the impact this case has on the power of local Vermont officials acting under authority of state law to protect the health and safety of citizens of Vermont and to influence the placement of radio and telecommunications facilities within Vermont's borders.

Under Supreme Court Rule 37, the Vermont Congressional Delegation consisting of Senator Jeffords, Senator Leahy, and Congressman Sanders, as residents of Vermont, seek to present the interests of residents of Vermont in the exercise of local control over health, public safety and land use matters regarding land located in Vermont and regarding residents of the Town of Charlotte, Vermont. A decision in this matter would have significant national implications for thousands of communities throughout the Nation.

The following parties have consented to the filing of this brief *Amici Curiae*: Petitioners – Gerald R. Tarrant, Esq. representing petitioners; Graeme Freeman, Mary Beth Freeman, Frank Ittleman, Elaine Ittleman, Mike Fournier, Holly Fournier, Ellen Lane, William Pinney, Jr., Mark W. Bolles, Claudia Mucklow, Donna A. Wark, Iris Muggenthaler, James H. Squires, Lawrence Hamilton, Robert Carmody, Mark Musiel, Michael Yantachka, Lorie Gaboury, Chris McGee, Peter

Coleman, Barbara Sanford Farrell, and William Pinney, Sr.; Respondents – Brian J. Sullivan, Esq. representing NYNEX Mobile Limited Partnership 1 d/b/a Verizon Wireless, Robert E. Fletcher, Esq. representing the Town of Charlotte, and John P. Cain, Esq. representing Burlington Broadcasters d/b/a WIZN. The following has not responded – Thomas Heilmann, Esq.

JAMES M. JEFFORDS therefore moves this Court for leave to file a brief *Amici Curiae*, with Patrick Leahy and Bernard Sanders, and asks this Court to accept for filing the attached brief in support of the petition for Writ of Certiorari on this the 23th day of June, 2000.

Respectfully submitted,

James M. Jeffords,
United States Senator
United States Senate
Washington, D.C. 20510
Phone: (202) 224-3121
Fax: (202) 228-0776

Patrick Leahy,
United States Senator

Bernard Sanders,
Member of Congress

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Industry's Attempts to have Congress and the FCC Preempt Local Siting Authority Have Been Rejected 4

II. Industry Reliance on Local Control 8

III. Limits on FCC Authority 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

AT&T Wireless PCS, Inc. v. City of Virginia Beach,
155 F.3d 423 (4th Cir.1998) 6

Appeal of Graeme and Mary Beth Freeman, et al.,
975 F. Supp. 570 (D. Vt. 1997) (Appendix D, in Petition for Writ of Certiorari) 4,8

Head v. New Mexico Board of Optometry,
374 U.S. 424 (1963) 8

Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission,
461 U.S. 190 (1983) 9

Statutes:

47 U.S.C. 302a(a)(1) 9

47 U.S.C.303(f) 9

47 U.S.C.332(c)(7) 5,7

47 U.S.C.332(c)(7)(B)(iv) 5

BRIEF OF *AMICI CURIAE* JAMES M. JEFFORDS AND OTHERS IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioners.[1]

INTEREST OF *AMICI CURIAE*

James M. Jeffords is a resident of Vermont and represents that state in the Senate of the United States of America, along with Senator Patrick Leahy. Congressman Bernard Sanders also represents Vermont as a resident and as a Member of the United States House of Representatives. The members of the Congressional delegation from Vermont are residents of Vermont and have an interest in the proper application of federal law in Vermont and thus seek to provide guidance in this matter as friends of this Honorable Court. The Charlotte Zoning Board of Adjustment notified respondents in a notice dated April 5, 1996, and set forth in Appendix I (Petition for Writ of Certiorari)[2], in part, that:

> The operation of the [tower] has caused long-term and continuous interference with electrical devices in homes and businesses through out the town. Transmission from this tower continue to interfere with devices including, but not limited to, telephones, answering ,stereos and tape machines, public address systems, televisions and VCRs, baby monitors, and computers and security systems. . . . [and] other stations on the FM dial."

[1]No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* contributed financially to the preparation of this brief.

[2]All future references to "Appendices" are references to the Appendices found in the Petition for Writ of Certiorari.

The above-quoted text demonstrates a significant problem in a Vermont community which local communities, such as Charlotte, Vermont, are able to address consistent with the United States Constitution, federal laws and federal regulations. We are lodging with this Honorable Court a Federal Communications Commission document published this month which articulates the important role that local communities have regarding the siting and uses of towers.

SUMMARY OF ARGUMENT

Amici respectfully submit this brief to urge the Court to grant the Petition for Writ of Certiorari. We respectfully urge that the Court of Appeals decision, affirming the decision of the District Court regarding the scope of federal preemptive authority regarding local authority over health and safety, and regarding local authority over land use, is not consistent with specific language set forth in the Federal Communications Act of 1934, as amended (FCA). We urge that federal law does not preempt state and local regulation of the siting and use of the radio tower in question under the facts set forth in this matter. There are specific federal statutes granting the Federal Communications Commission precise authority to regulate interference among licensed radio stations, radio operators, government stations and ships at sea but that explicit language does not imply, and should not be read to imply, that the Congress granted that authority in all other situations.

In general, *amici* urge that this issue is of great importance because of the dramatic increase in the siting, construction and use of telecommunications and radio towers in communities throughout the United States. The location of such towers near homes, schools, farms, churches, hospitals, airports, highways, and the whole host of work and home environments

is of great importance to the States, to local governments and citizens, and well as to the federal policy of enhancing access to communications. *Amici* urge that federal law establishes a balancing system within which States, and local governments, through the exercise of local health and safety powers, and certain powers over the use of land, have a significant role in the location, construction and use of these towers except in certain circumstances where Congress has specifically provided otherwise in a manner consistent with the United States Constitution. In this matter the respondents agreed to the conditions set by the local zoning authority such that the tower in question would not interfere with the operation of electronic devices in the town.

Amici further urge that federal law carefully delineates in many instances the respective roles of the federal government, the States, or the people.

More specifically, *amici* support the argument of petitioners that the town of Charlotte, Vermont, has the authority to require Burlington Broadcasters, d/b/a/ WIZN, and its co-permittees, to enforce a local permit to remedy the interference to local electrical and electronic devices used by local businesses and institutional services or be held in violation of its 1987 permit. They correctly argue that the town in question retains the authority to structure a reasonable solution, including the possible relocation of this tower or antennas, to provide for both radio and cellular telecommunication services as well as addressing community needs for the proper operation of electrical and electronic devices. Of course, the town's judgments in this regard are subject to judicial oversight.

This particular tower siting and use was approved by the town zoning board on the assurance and under the condition that interference with business and institutional electronic equipment would not occur, or would be rectified if it did occur where such interference with business and institutional electronic equipment continues to exist. District Court, Appendix C, pages 34a, at 38a through 39a. *Amici* urge that federal law, and the powers retained by the States, permit the town of Charlotte, Vermont, to enforce its reasonable conditions imposed on respondents and agreed to by respondent operator of the tower. District Court Opinion, Appendix C, at 37a and 38a.

ARGUMENT

I. Industry's Attempts to have Congress and the FCC Preempt Local Siting Authority Have Been Rejected.

In 1995 and 1996, the broadcast and wireless industries proposed bills to the Congress which would have granted broad preemptive authority to the FCC regarding the siting of broadcast and wireless facilities, including towers. Those proposals were expressly rejected by Congress in 1996 when Congress passed the Telecommunications Act of 1996 ("TCA 1996"). 110 Stat. 56 (1996), codified in scattered sections of 47 U.S.C.

While Congress did pass some preemptive language for mobile wireless facilities, it expressly rejected the broad sweeping language the industry proposed. The limited language that Congress did pass preempted towns and localities from regulating "the placement, construction and modification of personal wireless facilities on the basis of the environmental effects of radio

frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such regulations." 47 U.S.C. § 332(c)(7)(B)(iv). (Emphasis added.)[3] Congress rejected attempts to preempt local government authority over the siting of radio broadcast towers and other facilities.

No provision similar to section 332(c)(7), regarding personal wireless service, can be found in the Communications Act of 1934, as amended, regarding the siting of radio broadcast towers.

After enactment of the TCA 1996, members of Congress have seen additional unsuccessful attempts by the broadcast and telecommunications industry to preempt local and state authority to regulate the siting of towers and to preempt the general police powers our communities have enjoyed for the past 65 years over the siting of telecommunications facilities.

Local governments continue to have significant authority over the siting of radio broadcast towers and the case law certainly

---

[3]With respect to "mobile services" Congress also enacted in 47 U.S.C. 332(c)(7) provisions protecting local and state authority over the "placement, construction, and modification of personal wireless service facilities," but prohibited local and state governments from discriminating among providers and from prohibiting "the provision of personal wireless service" among other requirements for personal wireless service. See, Appendix N, pages 120a though 122a, of the Petition for Writ of Certiorari filed in this matter.

supports the FCC position.[4] Indeed, even with respect to mobile telecommunications towers where Congress has granted the FCC some preemptive authority, as just discussed, it is clear that local governments also retain a great deal of authority over the siting of those towers. *AT&T Wireless PCS, Inc. v. City of Virginia Beach,* 155 F. 3d 423 (4th Cir. 1998). The decisive opinion in *AT&T Wireless PCS* applies with much greater force to radio broadcast towers since Congress has not attempted to preempt local siting authority for such towers. Indeed, the Tenth Amendment to the United States Constitution in part provides that powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people . . ."

Local control over some aspects of telecommunications facilities has been reinforced this month in an FCC publication produced to help local planners determine what are appropriate siting policies. This guide is called "A Local Government Official's Guide to Transmitting Antennae RF Emission Safety: Rules, Procedures, Practical Guidance," ("Local Guide") and is dated June 2, 2000. The opening page of this guide was transmitted by William E. Kennard, Chairman, Federal Communications Commission, and Kenneth S. Fellman, Chair, Local and State Government Advisory Committee.

---

[4]In 1996, shortly after Congress passed the TCA 1996, the FCC did not adopt a request from the broadcast industry that the Commission preempt state and local communities over the placement, construction and modification of broadcast facilities on the basis of the health effects from radiation. The FCC, in part, noted:

> 167. The Telecommunications Act does not preempt state or local regulations relating to RF emissions of broadcast facilities or other facilities that do not fall within the definition of personal wireless facilities. FCC 96-326, Appendix Y, pages 181a and 182a.

The guide, written by the FCC's "Local and State Government Advisory Committee" includes the following language[5] regarding the FCC's own interpretation of the 1996 Telecommunications Act:

> [This document] does not address other issues such as construction, siting, permits, inspection, zoning, environmental review, and placement of antenna facilities within communities. Such issues fall generally under the jurisdiction of states and local governments, within the limits imposed for personal wireless service facilities by Section 332(c)(7) of the Communications Act .... Section 332(c)(7) generally preserves state and local authority over decisions regarding the placement, construction, and modification of personal wireless service facilities, subject to specific limitations set forth in Section 332(c)(7). Among other things, Section 332(c)(7) provides that "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions."

The guide's authors further explain that state and local governments and the FCC may "differ regarding the extent of state and local legal authority under Section 332(c)(7) and other pro-

---

[5]Footnote numbers from the original document are omitted. We will lodge the full text of this document with the Clerk of this Honorable Court.

visions of law.... Rather than address these legal questions, this document recognizes that, as a practical matter, state and local governments have a role to play in ensuring compliance with the FCC's limits . . ."

This is the clearest language to date from the FCC explaining the rights of local and state governments to regulate telecommunication facilities in their communities and reinforces the arguments being made by the petitioners from Charlotte.

II. Industry Reliance on Local Control.

For decades the industry has relied on landowners and local communities to accept radio towers. Radio towers have been constructed on private land with the approval of, and under conditions set by, local town zoning boards. This system protects homeowners, controls aesthetic blight, allows communities to use their police powers, and promotes planned community growth while protecting private investment in radio broadcast facilities which in turn can benefit communities rather than "impair" them as the Charlotte Zoning Board of Adjustment found had occurred in this matter. District Court Opinion, Appendix C, at 38a and 39a.[6] Indeed, the FCC Local Guide published this month and discussed earlier, describes such a system of local and federal partnership.

---

[6]Indeed, the case law on preemption regarding the FCC "cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation . . . ." *Head v. New Mexico Board of Optometry*, 374 U.S. 424, 429-30 (1963). Also see, notes 2 and 3.

III. Limits on FCC Authority.

The FCC is authorized to regulate the telecommunications industry and ensure that telecommunications signals and other devices do not interfere with radio communications. However, Congress has not granted the FCC unlimited powers. First, section 302a(a)(1) states in pertinent part:

> (a) The Commission may, consistent with the public interest, convenience and necessity make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, orother means in sufficient degree to cause harmful interference to radio communications.

That section provides the FCC with the authority to regulate devices that create spurious signals in sufficient degree to interfere *with a radio station or other communication signal.* It does not provide, on its face, authority for the FCC to promulgate rules to regulate the machinery of our local businesses and institutions.

Indeed, federal and local regulatory approaches can coexist and pursue different objectives allowing for local adjustments for local health, safety and land use reasons. *Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission,* 461 U.S. 190 (1983).

Finally, it is Congress that promulgates broad policies on who must accept interference and sets the rules for the FCC to follow. In the past, Congress has been concerned that signals and devices might have sufficient strength to interfere with other

radio communications. 47 U.S.C. §§ 302a(a)(1) and 303(f). Congress has very artfully and at times very gingerly granted the FCC authority over radio frequency interference.

It has not granted the FCC exhaustive authority in this area. Congress has been deliberate, not extravagant, in delegating to the FCC authority in these matters. The authority to make broad public policy decisions remains with Congress not the FCC. Moreover, reasonable local and state review of siting issues including local interference issues does not have any measurable impact on the federal scheme.

CONCLUSION

For the foregoing reasons, the *amici curiae* strongly urge this Court to grant the requested Petition for Writ of Certioriari.

Respectfully Submitted,

JAMES M. JEFFORDS
United States Senator
United States Senate
Washington, D.C. 20510
202 224-3121